

**JAMES MOSCRIPT**  
Claimant

**BLACK & WINDSOR, INC.**  
Respondent

**INDUSTRIAL INDEMNITY CO.**  
Insurance Carrier

## ORDER

## APPEARANCES

## RECORD & STIPULATIONS

## ISSUES

The Administrative Law Judge determined claimant failed to sustain his burden of proof that he suffered accidental injury arising out of and in the course of employment and further noted claimant did not sustain permanent disability as a result of the incident. Despite this negative finding, the Administrative Law Judge determined claimant was nonetheless entitled to medical compensation for the treatment claimant received in the emergency room after the accident and the medical treatment provided to claimant by his personal physician, Dr. Schmeidler.

The claimant requested review of the issues of whether he sustained accidental injury arising out of and in the course of employment and, if so, the nature and extent of disability.

At oral argument before the Board, the respondent conceded claimant did have a work-related accident. Respondent further agreed it would be liable for the emergency room treatment. Respondent contends the dispositive issue is whether claimant sustained any permanent disability and the Administrative Law Judge's negative finding on that issue should be affirmed.

### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The facts are essentially undisputed. The claimant, James T. Moscript, was employed as an over-the-road truck driver for respondent and was based out of Wichita. On February 11, 1999, claimant left Wichita around 4 a.m. with a load of scaffolding on a flat bed. Claimant arrived in Kansas City around 9 a.m. and then had to unload. Claimant headed back to Wichita around 6 p.m. and on his way stopped in Lawrence to pick up another load.

Claimant testified he was tired when he left Lawrence but not too tired to drive. Claimant testified he had been drinking coffee and fighting to stay awake. He had stopped at Matfield Green and also when he got off the turnpike at El Dorado. After leaving the turnpike, the claimant proceeded back to Wichita on route 254 and the last thing he recalled was switching the cruise control off when he crossed Hillside road.

The claimant's truck struck a guardrail, crossed the median, crossed the opposite lanes of travel and hit a chain-link fence and several big round hay bales. The fence stretched and slowed the truck to a stop. Claimant was awakened by emergency personnel. Claimant testified he injured his forehead on the left side but doesn't recall what he hit. Claimant testified he really doesn't know what caused him to drive off the road, but that he was fuzzy headed when he awoke.

Jimmie Lee Atkinson, a trooper for the Kansas Highway Patrol, responded to a truck accident that occurred approximately 8 p.m. on February 11, 1999. Trooper Atkinson testified that upon arriving at the scene, the claimant seemed very disoriented and didn't respond to his questions. The claimant had a lack of motor skills similar to a drunk driver but he didn't have the smell of alcohol on his breath nor did he have the bloodshot, watery eyes that he associated with intoxication, so he thought the claimant could be having a seizure. Trooper Atkinson testified that upon physical appearance the claimant did not have any open gashes, head wounds or apparent injuries.

Trooper Atkinson testified that about 25-30 minutes after he arrived at the accident scene the claimant told him that he had a seizure, struck the guardrail, went across the lanes of travel and then into the fence. When claimant's employer, Henry Winsor, arrived at the scene, the claimant also told Mr. Winsor that he had a seizure.

Mr. Winsor asked claimant if he was all right or needed to go to the hospital and claimant indicated he did not need treatment. Nonetheless, the claimant was transported to the hospital emergency room by Mr. Winsor's son for a post accident drug screen urinalysis and to confirm claimant was not injured. The claimant was in the emergency room for approximately two hours and was released that night.

The claimant was seen the next day by his personal physician, Dr. Schmeidler, who ordered an EEG, CT scan, and carotid Doppler studies. The CT scan revealed old remote encephalomalacia in the right frontal lobe. The carotid ultrasound was negative and the EEG showed slowing but was otherwise unremarkable. Dr. Schmeidler concluded claimant had not had a seizure but had fallen asleep.

The encephalomalacia revealed by the CT scan was the result of a motorcycle accident the claimant had in 1966. Following that accident the claimant had been in a coma for approximately ten days. Cerebral encephalomalacia is an area of old brain injury where part of the brain has atrophied. In 1975 the claimant started having seizures and was provided medication for that condition. The seizures stopped in 1978 and in 1985, the claimant discontinued taking the medication for the seizures. He had not experienced any seizures since 1978 before the February 11, 1999 accident.

On April 28, 1999, the claimant had two grand mal seizures. The claimant was placed on Dilantin and Tegretol and referred to James A. Isaac, M.D. for treatment. Dr. Isaac, a board certified neurologist, saw the claimant on April 30, 1999, and performed a neurological examination of the claimant. The doctor noted claimant's CT scan revealed encephalomalacia of the right frontal lobe. The claimant had an EEG on April 28, 1999, that revealed a slightly slow EEG. The doctor compared the EEGs from February 16, 1999, and April 28, 1999, and noted there was no change. The doctor noted the examination was otherwise normal. Dr. Isaac advised the claimant he was not to drive for six months.

Dr. Isaac saw claimant again on June 25, 1999, and was advised by the claimant that he had not had any additional seizures. Claimant was again seen by Dr. Isaac in August 1999. Claimant advised the doctor he had not had any seizures and was feeling great. Dr. Isaac again saw the claimant in February 2000 and August 2000, and noted the claimant's seizures were still controlled and claimant had not had any additional seizures since April 1999.

The claimant contends the Administrative Law Judge erred in finding that claimant did not sustain an injury in the accident. Whether claimant sustained injury is controverted. Claimant testified he hit the side of his head during the accident and had abrasions with slight bleeding on the side of his head. The investigating highway patrol trooper specifically testified claimant did not have any gashes, head wounds or apparent injuries. Moreover, the claimant also testified he did not recall the accident which contradicts his statement that he hit his head during the accident.

The dispositive issue is whether the claimant sustained any permanent disability as a result of the truck accident. Claimant notes that he had been seizure free without medication for approximately twenty years and then two months after the accident he had two seizures and is now again required to take medication to control his seizures. Claimant argues that the cause for his recurrent seizures was the accident on February 11, 1999.

Claimant's attorney referred him to Philip Roderick Mills, M.D. for evaluation. Dr. Mills opined that the claimant fell asleep on February 11, 1999, and that resulted in the accident. He also opined the accident with the syncopal episode resulted in or caused the subsequent seizures which occurred in late April 1999. Dr. Mills testified that after a head injury a person is at an increased risk of seizure activity and in claimant's case he had a substantial first head injury and a more mild second injury. The doctor concluded the most probable explanation he could come up with for the April 1999 seizures was the February 11, 1999, accident.

As previously noted, after claimant had the seizures in April 1999, he received treatment from James A. Isaac, M.D. Dr. Isaac, a board certified neurologist, opined that it is more probably true than not that it was the 1966 head trauma claimant suffered which is the cause of claimant's seizures in April 1999.

Dr. Isaac noted claimant had sustained a significant brain injury in 1966. The doctor then contrasted the incident in 1999 which only resulted in claimant being seen in the emergency room and released after a couple of hours. Dr. Isaac concluded the cause of the seizures in April 1999 was the brain injury claimant sustained in 1966.

The respondent's attorney referred claimant to Michael E. Ryan, M.D. for an evaluation on November 8, 2000. Dr. Ryan, board certified in neurology, opined the claimant's seizure disorder was secondary to the injury he had sustained as a result of a closed head injury dating back to 1966 at which time he suffered a skull fracture. Dr. Ryan's impression was based on the CAT scan which demonstrated an area of old injury in the right frontal region of his brain.

Dr. Ryan testified he could not tell whether the claimant had fallen asleep or had a seizure in order to cause the motor vehicle accident. Dr. Ryan further testified that there was no relationship between the claimant's seizures and any alleged head injury in February 1999. Dr. Ryan did not think the claimant had sustained a significant injury to his

head at the time of the February 1999 motor vehicle accident. The doctor did note claimant had significant problems dating back to the motorcycle accident in 1966. Lastly, Dr. Ryan concluded the claimant did not sustain any permanent injuries as a result of the February 1999 accident.

The administrative law judge adopted the two board certified neurologists' opinions that the claimant's seizures in April 1999 were not caused by the February 11, 1999, accident. The Board agrees. There was minimal evidence claimant sustained any significant injury in the motor vehicle accident. The highway patrol trooper contradicted claimant's testimony that he sustained any obvious injury and the minimal stay at the emergency room, which was primarily to obtain samples for drug testing, further supports the finding claimant did not sustain any significant injury. The Board affirms the Administrative Law Judge's decision that claimant has not established he sustained any permanent disability as a result of the February 11, 1999, accident.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated March 16, 2001, is hereby modified to find claimant suffered a work-related accident on February 11, 1999, but is otherwise affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Robert R. Lee, Attorney for Claimant  
       Douglas C. Hobbs, Attorney for Respondent  
       Jon L. Frobish, Administrative Law Judge  
       Philip S. Harness, Workers Compensation Director